



Memorandum

TO: PLANNING COMMISSION

FROM: Stephen M. Haase

**SUBJECT: PROTEST OF A NEGATIVE
DECLARATION FOR A PLANNED
DEVELOPMENT REZONING
(PDC00-06-049)**

DATE: June 19, 2001

Council District: 10

BACKGROUND

This is a protest of a Negative Declaration (ND) prepared for a Planned Development Rezoning from A(PD) Planned Development Zoning to A(PD) Planned Development Zoning District, to allow the addition of a drive-through lane and pick-up window to an existing fast food restaurant on a 5.31 gross acre site located on the southwest corner of Almaden Expressway and McAbee Road. The site is currently occupied with a commercial shopping center comprised of four buildings totaling 54,541 square feet. The fast food restaurant is 6,346 square feet in size.

A Mitigated Negative Declaration was circulated May 29, 2001 to property owners/occupants within 1,000 feet of the project site. Two letters protesting the adequacy of the Negative Declaration were filed in the Department of Planning, Building and Code Enforcement on June 14, 2001 and June 18, 2001. One of the letters identified an inaccuracy in the dimensioned distance from the project site to the residentially zoned properties across Almaden Expressway and McAbee Road on the site plan. The applicant corrected the dimension and a Mitigated Negative Declaration was circulated for that project on October 31, 2001. The Mitigated Negative Declaration was issued for the original project. Staff and the applicant intend the Mitigated Negative Declaration to provide environmental clearance for the alternative project designs outlined in the Planned Development rezoning staff report.

ANALYSIS

The Draft Mitigated Negative Declaration for this project was prepared in conformance with the California Environmental Quality Act (CEQA). Section 21080 of the CEQA Statute and Section 15070, subd. (b) (1) of the Guidelines specify that a Negative Declaration may be prepared where the Initial Study identifies potentially significant effects, but revisions in the project plans or proposals made by, or agreed to by the applicant before proposed mitigated negative

declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur. The Initial Study prepared for this project examined the potential for the project to result in significant environmental impacts. It concluded that the project would not result in a significant environmental impact and would not require the preparation of an Environmental Impact Report (EIR).

The City of San Jose received one letter of protest on the Draft Mitigated Negative Declaration during the public review period from October 31 through November 20, 2001. The letter is reproduced in sections on the following pages, followed by the City's response to the issues raised in the letter. In addition, a complete copy of the letter itself is attached, including attachments.

RESPONSE TO COMMENTS RECEIVED FROM TIMOTHY J. DONOVAN, DATED NOVEMBER 19, 2001, RECEIVED NOVEMBER 20, 2001:

COMMENT 1

I reside in the Almaden Hills Estates and my response will be made in behalf of Almaden Hills Estates Homeowners Association and Almaden Hills Estates homeowners, Compton Chase Homeowners and other homeowners in the near vicinity of McDonalds Restaurant. Please see signed homeowner petitions attached to my Formal Protest of Negative Declaration Dated June 18, 2001.

The proposed project will have significant adverse effects on the environment if the project is approved. Our opposition is based upon the following grounds:

I. PROPOSED MC DONALD DRIVE-THROUGH RESTAURANT CLEARLY

VIOLATES DRIVE-THROUGH USES, CITY COUNCIL POLICY NUMBER 6-10 WHICH STATES IN PERTINENT PART:

"... THE PROPOSED DRIVE-THROUGH USE NEEDS TO BE GREATER THAN 200 FEET FROM IMMEDIATELY ADJACENT OR OPPOSITE RESIDENTIALLY ZONED PROPERTIES."
(See Council Policy No. 6-10 attached as Exhibit A.)

A careful review of McDonalds' revised Site Plan, dated May 1, 2001, discloses that all measurements were made to actual residences and not to the zoned property line as required. Specifically, on McAbee Road there are seven (7) properties that would be less than 100 feet from the proposed drive-through; and on Almaden Expressway there are three to four properties that would be approximately 150 feet from the proposed drive-through. To grant McDonalds a waiver under these circumstances would result in an egregious violation of the public trust.

We respectfully take issue with the Department of Planning Environmental Checklist, page 6, entitled: IX. LAND USE AND PLANNING. which states in pertinent part, "...DISCUSSION: Project is consistent with General Plan but inconsistent with City Council Drive-through Policy regarding distance from Residentially zoned properties, which states that:

"Drive-through uses shall be located 200 feet or more from immediately adjacent or directly opposite residentially used, zoned or General Planned properties. This would be less than significant impact."

We respectfully disagree with this interpretation of the general plan. Clearly, the 1986 approval of a negative declaration for a small shopping center made no mention whatsoever for a drive-through restaurant. To arbitrarily waive the distance requirement, of Council Policy No. 6-10 would result in the creation of a private nuisance by McDonald Corporation that clearly interferes with the use and enjoyment of the properties in the immediate vicinity of the proposed drive-through. This project should be soundly rejected.

Furthermore, review of Environmental Checklist, page 1, which states in pertinent part, "... although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent." A cursory review of the file will disclose that with the exception of a letter dated July 31, 2001 re: Noise Assessment Study Update, nothing of any significance has been filed since McDonald's initial Negative Declaration dated May 29, 2001 which was taken off calendar in June, 2001.

If this project is approved it will have a severe affect on the environment because it will degrade the quality of life of those homeowners in the immediate vicinity of the proposed project. Moreover, safety, traffic, glare and litter will affect a greater number of citizens.

STAFF RESPONSE TO COMMENT 1

Conformance with the City Council drive-through separation requirements is not a threshold of significance for the initial study. The proposed project includes separations of approximately 150 feet across McAbee Road with a 106 foot right-of-way, and of approximately 210 feet across Almaden Expressway with an approximately 170 foot right-of-way between the drive-through aisle and existing single family residences. City Council Policy requires drive-through uses to be located 200 feet from immediately adjacent or opposite residentially zoned properties. The drive-through policy will be reviewed at the time the project is considered by the Planning Commission and City Council for rezoning.

COMMENT 2

III. NOISE LETTER DATED JULY 31, 2001 DOES NOT ACCURATELY PREDICT NOISE LEVELS AT ALMADEN AND COMPTON CHASE PROPERTY LINES.

Measured distances to respective property lines are incorrect. It appears from Mr. Pack's (i.e., noise engineer) diagram that measurements were made from speaker to mid point of residence to property line. exhibited attached depicts the correct distance to the respective property lines from the drive-through. Council Policy No. 6-10 states in pertinent part,

"Noise:

- a. Drive-through speakers shall not be audible from adjacent
residentially used, zoned or General Planned properties.*

be Drive-through speakers shall not be used when the drive through lane abuts residentially used, zoned or General Planned properties."

McDonald's proposed drive-through project violates Council Policy No. 6-10; (Noise) (a) and (b).

The City of San Jose standard utilized a Day-Night Level (DNL) and specifies a limit of 55 dB DNL at residential property line by non-transportation related noise sources, such as sound amplification equipment similar to McDonald's proposed speaker amplifier. The peak noise from the speaker (i.e., amplifier) may be significantly higher than the average transportation noise (i.e., road noise) because both transportation and non-transportation noise sources generate different noise frequency spectrums. Moreover, the speaker noise remains constant while the road noise varies considerably, depending on whether it is day or night.

Council policy requires that single-event, short term noise (i.e., speaker noise) be analyzed as it would be perceived at any given time by a nearby neighbor. Under this criteria McDonald's fails to meet standard.

STAFF RESPONSE TO COMMENT 2

The noise report prepared for the project by Edward L. Pack Associates, dated April 9, 1998 last revised July 31, 2001, concludes that noise exposure and noise levels will be within the limits of the standards of the City of San Jose Noise Element, which specifies a limit of 55 dB DNL at residential properties impacted by non-transportation related noise sources. The worst case single-event maximum noise level at the property line is 37dBA. The City Council Drive-Through Policy states that the drive-through menu board speaker shall not be audible at any adjacent residential property line. A noise source will be audible if it, typically, is at or higher than the existing ambient noise level exceeded 90% of the time. While the existing ambient noise exposures from traffic in the rear yards of houses were found to be up to 76 dB DNL across Almaden Expressway and up to 69 dB DNL across McAbee Road, the quiet background noise levels measured during the planned operational hours of the drive-through were found to be as low as 43 dBA. The noise exposures from the speaker were determined to be only 30 dB DNL across Almaden Expressway, and 27 dB DNL across McAbee Road. The report concluded that because these noise impacts will be below these established thresholds, there will not be a significant impact and mitigation measures will not be required.

COMMENT 3

Furthermore, all other issues in my June 18, 2001 OPPOSITION letter, such as traffic congestion, safety, litter, lighting and archaeology are fully incorporated herein.

RESPONSE TO COMMENTS RECEIVED FROM TIMOTHY J. DONOVAN, DATED JUNE 18, 2001, RECEIVED JUNE 18, 2001:

III. TRAFFIC CONGESTION IS A MAJOR CONCERN TO ALMADEN VALLEY RESIDENTS.

Furthermore, if the Winfield/Almaden road extension is approved in the near future traffic will most likely double or triple at this site. In summary, we believe that if McDonalds Restaurant Drive-Through Project is approved a severe traffic and safety problem will result.

It is noted in a memorandum from Timm Borden of Public Works to Sally Notthoff-Zarnowitz of Planning & Building, dated May 31, 2001, requests a referral to Santa Clara Valley Transportation Authority for a traffic evaluation.

If the McDonalds Restaurant drive-through is approved a dangerous situation will be created because upon entering the parking lot from Almaden Expressway the customer would be required to make an immediate hairpin turn to the right. It is reasonably foreseeable that with automobile engines idling that traffic would back-up onto Almaden Expressway, creating a very dangerous situation (i.e., similar to Classic Car Wash at Cherry and Almaden Expressway).

Let us not forget unhealthy automobile emissions from the cars with engines idling backed up in line waiting to be served.

STAFF RESPONSE TO COMMENT 3

The Department of Public Works reviewed this traffic impacts of this project, and issued this statement in the attached Memorandum:

“Increased Traffic: Retail projects proposing less than 5,000 sq. ft. are exempt from the City’s Transportation LOS policy. As a comparison, a 5,000 sq. ft. retail project generates approximately 50 peak hour trips. This proposed drive-through would generate approximately 18 new peak hour trips. These 18 trips represent the difference between a restaurant without a drive-through as compared to one with a drive-through. Therefore, the proposed project is exempt from the LOS policy.”

The Department of Public Works does not review on-site traffic/pedestrian circulation. However, by adding the drive-through, they do not anticipate any significant decrease in safety for vehicles making right turns off the expressway to enter the drive-through because under the current operational conditions, customers do the same thing to approach the restaurant.

The project was referred to the Valley Transportation Authority on June 13, 2001. A memorandum was issued requesting that the bus location adjacent to the site on Almaden Expressway be maintained.

The proposed project will not result in a significant effect on air quality. The 18 new peak hour vehicle trip number is significantly less than the 2,000 new trip threshold established by the Bay Area Quality Management District for significant emissions related to vehicle trips.

COMMENT 4

LITTER, LIGHTING AND ARCHAEOLOGY.

An Environmental Review Check List, List Item #11, acknowledged substantial change in existing glare, noise and vibration levels in the vicinity. Another Environmental Check List required reports on Archaeology and Noise. To date the Noise report is outdated and inaccurate and no Archaeology report has been filed. Litter is clearly a reasonable concern and drive-through customers greatly contribute to this problem.

STAFF RESPONSE TO COMMENT 4

The checklist item referred to was from the file for the Mitigated Negative Declaration circulated on May 29, 2001 which included noise, glare or vibration. The item was checked because of the noise report required to determine whether or not the speaker would be audible from residential property lines. The project will not significantly increase glare or vibration because the project will not create a new source of substantial light or glare that would adversely affect day or nighttime views in the area, nor would the project expose persons to excessive ground borne vibration.

Refer to response to comment 3 above regarding the submitted noise report.

The project is located in an area classified as “archaeologically sensitive” and past archeology reports have indicated that subsurface cultural resources could exist on site. Construction could thus possibly impact these archeological resources.

The project will incorporate mitigation measures incorporated into the Negative Declaration for the original Zoning for the property, PDC86-03-022, adopted on May 27, 1986. In order to monitor and mitigate against any possible impact to subsurface cultural resources, a qualified Archeologist will be required to monitor all subsurface grading. The procedures regarding this monitoring are as follows:

- If no resources are discovered, the archaeologist shall submit a report to the Director of Planning verifying that the required monitoring occurred and that no further mitigation is necessary.
- If evidence of any archaeological, cultural, and/or historical deposits are found, hand excavation and/or mechanical excavation will proceed to evaluate the deposits for determination of significance as defined by CEQA guidelines. The archaeologist shall submit reports, to the satisfaction of the Director of Planning, describing the testing program and subsequent results. These reports shall identify any program mitigation that the Developer shall complete in order to mitigate archaeological impacts (including resource recovery and/or avoidance testing and analysis, removal, reburial, and curation of archaeological resources.)
- In the event that human remains and/or cultural materials are found, all project-related construction shall cease within a 50-foot radius in order to proceed with the testing and

mitigation measures required. Pursuant to Section 7050.5 of the Health and Safety Code and Section 5097.94 of the Public Resources Code of the State of California:

COMMENT 5

V. MC DONALDS RESTAURANT PRECEDENT SETTING ATTEMPT TO ADD A DRIVE-THROUGH IN ALMADEN VALLEY SHOULD BE SOUNDLY REJECTED.

McDonalds Corporation knew at the time they entered into a contract for operating a restaurant at said site that in 1986 a Negative Declaration was approved by the City Planning Commission for 5.2 acre shopping center and restaurant without a drive-through. California Cafe Restaurant previously occupied said site for eight years. McDonalds Corporation entered into a contract to operate a McDonalds Restaurant at said site with their eyes wide open and no intentional misrepresentations, deceit or fraud in the inducement were perpetrated by anyone against McDonalds Restaurant. Now McDonalds Restaurant wants to add a drive-through which would create an environment blight on the quality of life in Almaden Valley. The once "sleepy bedroom type community" would be transformed overnight into a "commercial/industrial nightmare," with numerous fast food establishments all demanding the additions of drive-through because McDonalds Restaurant was granted approval. In 10 years Almaden Valley could be easily molded into Glitzville, USA with numerous drive-through restaurants, large neon signs and have large industrial and commercial businesses.

Simply put, McDonalds Corporation acted in "bad faith" to the citizens of Almaden Valley when they first opened their restaurant in representing to the citizens of Almaden Valley that they had no intentions of seeking approval for a drive-through restaurant.

In summary, historically there was no drive-through and said site was not zoned for a drive-through; and no expectations of drive-through use was anticipated.

Therefore, McDonalds Restaurant's petition for approval of negative declaration should be denied.

STAFF RESPONSE TO COMMENT 5

The protestant is correct in that the existing Planned Development zoning allows for commercial development of a shopping center and does not specifically include drive-through uses. The project in question is a rezoning to allow the proposed drive-through use. The above comment does not raise any environmental issues that are relevant to the Negative Declaration protest.

Also refer to response to Comment 1 above.

CONCLUSION

The California Environmental Quality Act (CEQA) specifies that the lead agency shall adopt a Negative Declaration if it determines, based upon substantial evidence, that a proposed project would not have a significant effect on the environment. Substantial evidence includes (1) fact, (2) a reasonable assumption predicated upon fact, or (3) expert opinion supported by fact. Substantial evidence is not an argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

The Director of Planning, Building and Code Enforcement issued and adopted a Mitigated Negative Declaration based upon the initial study and other evidence in the record. The City is required to respond to written comments filed with the Director of Planning. While it is known that some public controversy exists regarding the project itself, no substantial evidence has been submitted to indicate that the controversy is relevant to the environmental impacts of the proposal. Preparation of an EIR for this project would not disclose any more substantial information regarding the environmental impacts of the project than is currently known.

ALTERNATIVES

The action of the Planning Commission in considering the protest is limited to environmental issues.

If the Planning Commission finds that the project may have a significant effect on the environment, the Commission shall require the preparation of an EIR prior to any consideration of whether the project should be approved. In such event, the Director shall thereafter refund the filing fee to the protestant.

If the Planning Commission upholds the action of the Director, the Negative Declaration shall become final and no further appeals on the matter may be considered.

RECOMMENDATION

The Director of Planning, Building & Code Enforcement recommends that the Planning Commission uphold the Negative Declaration prepared for the proposed project.

Stephen M. Haase, AICP, Director
Planning, Building and Code Enforcement

SMH:RE:SNZ

Attachments

C: Timothy J. Donovan, 1081 Crosspoint Court, San Jose, CA 95120
Morris Chassen, 1108 Zinfandel Way, San Jose, CA 95120